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No. 82-193

In the Supreme Court of the United States

October Term, 1981

JULJA McCAIN LAMPKIN-ASAM,
Appellant,

vs.

MIAMI DAILY NEWS, INC. and TIMOTHY JOHNSON, as Personal Representative of the late Terry Johnson King,
Appellees.

On Appeal From District Court of Appeal, Third District of Florida

MOTION OF APPELLEES, MIAMI DAILY NEWS, INC. AND TIMOTHY JOHNSON, AS PERSONAL REPRESENTATIVE OF THE LATE TERRY JOHNSON KING, TO DISMISS OR AFFIRM

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August 30, 1982

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QUESTIONS PRESENTED

1. Whether[1] Florida's appellate procedures, establishing review as a matter of right by an intermediate court but limiting further appellate review to the discretion of the Florida Supreme Court, is violative of the First the Fifth, the Sixth, or the Fourteenth Amendment to the United States Constitution?

2. Whether[2] the original jurisdiction of the Supreme Court of the United States can be invoked pursuant to 28 U.S.C. §2106 or 42 U.S.C. §1983?

3. Whether[3] either the First Amendment or the Sixth Amendment to the Constitution of the United States of America requires a trial by jury in a state court of a civil action at law?

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1. This question is a restatement of questions I, II, and VII of the "Questions Presented" of Appellant.

2. This question is a restatement of questions III, IV, and V of "Questions Presented" of Appellant.

3. This question is a restatement of question VI of the "Questions Presented" of Appellant.

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No. 82-193

In the Supreme Court of the United States

October Term, 1981

JULIA McCAIN LAMPKIN-ASAM,
Appellant,

VS.

MIAMI DAILY NEWS, INC. and TIMOTHY JOHNSON, as Personal Representative of the late Terry Johnson King,
Appellees.

ON APPEAL FROM DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA

MOTION OF APPELLEES, MIAMI DAILY NEWS, INC. AND TIMOTHY JOHNSON, AS PERSONAL REPRESENTATIVE OF THE LATE TERRY JOHNSON KING, TO DISMISS OR AFFIRM

Pursuant to Rule 16, *Rules of the Supreme Court*, the Appellees, Miami Daily News, Inc. and Timothy Johnson, as personal representative of the late Terry Johnson King, make application to the Court for an order either affirming the opinion and judgment of the District Court of Appeal, Third District of Florida, or, in the alternative, dismissing this Appeal.

The bases for this application are stated more particularly as follows:

1. Pursuant to Rule 16(a), *Rules of the Supreme Court*, an order of dismissal is sought in that this appeal is not within the jurisdiction of this Court and is not taken in conformity with 28 U.S.C. §1257. The decision of the District Court of Appeal, Third District of Florida, is not against the validity of any treaty or statute of the United States and is not in favor of the validity of any statute challenged on the ground of such statute being repugnant to the Constitution, treaties or laws of the United States.

2. Pursuant to Rule 16(b), *Rules of the Supreme Court*, an order of dismissal is sought in that any federal question sought to be reviewed here was not timely or properly raised and expressly passed on by the Florida courts.

3. Pursuant to Rule 16(b), *Rules of the Supreme Court*, an order of dismissal is sought in that this proceeding does not present a substantial federal question.

4. Pursuant to Rule 16(c), *Rules of the Supreme Court*, an order of affirmance is sought, in the alternative, in that it is manifest that the questions upon which the decision of this cause depends are so unsubstantial as to not need further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, *Constitution of the United States*

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, *Constitution of the United States*

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, *Constitution of the United States*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Fourteenth Amendment, *Constitution of the United States*

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive the person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28

§1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States.

For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.

United States Code, Title 28

§2106. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such ap-

propriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

United States Code, Title 42

§1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Florida Constitution, Section 3

(b) JURISDICTION. The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state

officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

Florida Constitution, Section 4

(b) JURISDICTION.—

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

(2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.

(3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

STATEMENT

The Appellant filed, in a Florida trial court,[4] a civil action at law, sounding in libel. (App. A3) Ultimately, the trial court entered summary judgment against the Appellant. (App. A3) Under Florida law, the Appellant had an absolute right to appellate review by an intermediate appellate court. She exercised that right. She complained to the intermediate appellate court[5] that the trial court had misapplied the law. She said the trial court was wrong. At no time did she suggest that the trial court had not accorded due deference to her constitutional rights. The intermediate appellate court disagreed.[6] The trial court was affirmed. (App. A1-A8, A9)

The Appellant then sought a second appellate review—this time by the Florida Supreme Court. (App. A10) She attempted to convince the Florida Supreme Court that the decision of the intermediate appellate court conflicted with other reported appellate decisions. (App. A12-A25) At no point did she suggest to the Florida Supreme Court that the trial court or the intermediate appellate court had failed to respect her constitutional rights. (App. A12-A25)

Under Florida law, review of an appellate decision is a matter within the discretion of the Florida Supreme Court. Appellant did not get a second appeal. The Florida Supreme Court exercised its discretion by refusing

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4. The Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida.

to review the intermediate appellate court's decision. At

5. District Court of Appeal of Florida, Third District.

6. The decision of the intermediate appellate court has been reported. Lampkin-Asam v. Miami Daily News, Inc., 408 So.2d 666 (Fla. 3d DCA 1982).

no time did the Appellant suggest to the Florida Supreme Court that the limited and discretionary review by a second appellate court impaired her exercise of rights granted to her under the United States Constitution.

Neither the decision of the intermediate appellate court (App. A1-A8, A9) nor the order of the Florida Supreme Court (App. A36) invalidates any treaty or statute of the United States. Neither passes on the validity of any statute challenged on the ground that the statute is repugnant to the Constitution, treaties or laws of the United States. No such issues were raised in the Florida courts.

ARGUMENT

Appellant's Invocation of "Original Jurisdiction"

In the Florida courts, there were three parties to this matter. One was Appellant, who was the plaintiff in the trial court. The remaining parties were the two defendants, Miami Daily News, Inc. and Timothy Johnson, as personal representative of the late Terry Johnson King.

In the Supreme Court of the United States, however, Appellant has broadened her litigation. In addition to the adverse parties in the Florida courts, she has added as parties the Florida courts themselves. The Appellant purports to accomplish this through a baseless invocation of this Court's "original jurisdiction."[7]

The original jurisdiction of the Supreme Court of the United States is constitutionally created. Article III, Section 2, *Constitution of the United States*. It is defined by statute. 28 U.S.C. §1251. Appellant has simply ignored these constitutional and statutory provisions. Without

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7. This argument responds to questions III, IV, and V of Appellant's "Questions Presented."

benefit of leave of this Court and without so much as a complaint or initial process, she has attempted to establish, under 42 U.S.C. §1983, a civil rights action against the intermediate appellate court which ruled against her.[8] She does this even though 28 U.S.C. §1343 grants to the federal district courts original jurisdiction over civil rights actions. Appellant also relies upon 28 U.S.C. §2106. The jurisdiction of the Supreme Court of the United States is in no way impacted by 28 U.S.C. §2106, which merely is a congressional grant of broad remedial power. This statute is in no way a grant of jurisdiction, despite Appellant's reliance on it. Appellant's attempt to invoke this Court's "original jurisdiction" is baseless, especially when viewed in light of the asserted authority for such invocation.

Due Process in Florida's Courts

While differing in nuance and detail, Florida's court system is not unlike the Federal system.[9] It is a three-tier system. The trial courts, known as the "Circuit Courts," are courts of general jurisdiction, hearing equity matters and, where the amount in controversy exceeds $5,000, matters at law. Article V, Section 3, *Florida Constitution; Florida Statutes* 26.012 (1981). Under Florida law, a party aggrieved by a final judgment has an absolute right to appellate review by an intermediate appellate court, known as "District Courts." Article V, Section 4(b), *Florida Constitution*. Immediate review of interlocutory orders is limited, but any interlocutory order entered prior to final

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8. Even were jurisdiction properly vested, this "civil rights" action against Florida courts would encounter substantial obstacles. Stump v. Sparkman, 435 U.S. 349 (1978).

9. This argument responds to questions I, II, and VII of Appellant's "Questions Presented."

judgment may be reviewed by the intermediate appellate court reviewing the final judgment.

By state constitution, Florida's Supreme Court is less accessible. Its jurisdiction is limited and in some areas, even where it could exercise jurisdiction, Florida's Supreme Court has the right to decline to do so. Article V, Section 3(b), *Florida Constitution*. Thus, after an initial determination is made by a Circuit Court, a litigant in Florida has an absolute right to one appellate review and a chance of a second appellate review in the Florida Supreme Court.

It is the structure of this judicial system which Appellant claims is constitutionally defective. She is clearly wrong.[10] Notwithstanding Appellant's claim to the contrary, there is simply nothing in the First Amendment or the Sixth Amendment to the United States Constitution which precludes Florida from affording its litigants a system which parallels the Federal court system. Florida litigants have an absolute right to one appellate review and a chance at a second appellate review. The "due process" requirements of the Fifth and Fourteenth Amendments to the Constitution do not require that Florida accord its litigants any appellate review at all. *National Union of Maritime Cooks and Stewards v. Arnold*, 348 U.S. 37 (1954); *District of Columbia v. Clowans*, 300 U.S. 617 (1937); *McKane v. Durston*, 153 U.S. 684 (1894). "Due process" requires only that there be due process in the tribunal of first instance, here Florida's trial court. *Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74 (1930). Appellant never claimed in the Florida

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10. Perhaps it is for this reason that Appellant has not filed with this Court any certificate from a Florida court that a substantial federal question was raised and decided. Nor has Appellant sought from the Florida Court such a certificate. Herb v. Pitcairn, 324 U.S. 117 (1944); Whitney v. California, 274 U.S. 357 (1927).

courts that she was not afforded due process in the trial court, only that the trial court was wrong. Her "due process" argument arises merely from the fact that the Florida Supreme Court, in the exercise of its discretion, declined to grant her a second appeal. The argument is clearly frivolous.

The Lack of a Substantial Federal Question

This appeal presents only insubstantial Federal questions. Moreover, none of these questions, to the extent they be Federal questions, were raised and decided in the Florida courts.[11]

Appellant contends there is something in the Constitution of the United States which requires that the Florida courts afford her a jury trial in a civil action at law.[12] In advancing this specious argument, Appellant relies upon the First and Sixth Amendments to the United States Constitution. The First Amendment guarantees Appellant the right to speak freely, but it does not guarantee her the right to speak to a jury in a Florida court. The Sixth Amendment reflects the Founding Fathers' concern that governmental power would override the rights of a criminal defendant. Appellant was not in the Florida court a criminal defendant; she was a plaintiff in a civil action at law.[13] The Sixth Amendment in no way im-

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11. Pursuant to 28 U.S.C. §2103, the Supreme Court of the United States may treat an improvident appeal as a Petition for Writ of Certiorari. However, the lack of a substantial federal question here precludes such treatment.

12. This argument responds to question VI of Appellant's "Questions Presented."

13. More germane perhaps would be the Seventh Amendment to the Constitution of the United States. However, the Seventh Amendment operates, by its terms, only on courts of the United States. This Amendment has not been incorporated into the Fourteenth Amendment and therefore is not operative upon the several states. Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U.S. 211 (1916).

pacts Appellant's rights in this case. Nor does the "due process" of the Fourteenth Amendment guarantee her a jury trial in state court.[14] *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 384 U.S. 151 (1931); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226 (1923).

Equally insubstantial is the Appellant's claim of a federal question arising from the structure of Florida's court system. She complains that she was only allowed one appellate review. One appellate review is more appellate review than due process requires. *National Union of Maritime Cooks and Stewards v. Arnold, supra.* Due process only requires that there be due process in the court of first instance. *Ohio ex rel. Bryant v. Akron Metropolitan Park District, supra.* Nowhere has Appellant claimed this was not the case. There is simply no substantial federal question for this Court to review.

As in the Florida courts, Appellant here contends that the trial court was wrong. Assuming *arguendo* this to be the case, mere judicial error in a state court does not raise an issue of constitutional proportions. *Buchalter v. New York*, 319 U.S. 427 (1943); *Worcester County Trust Co. v.*

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14. Appellant does not contend that an inappropriate standard was utilized in entering summary judgment. In fact, Florida's intermediate appellate court evaluated the propriety of summary judgment against traditional standards. *Compare* Hutchinson v. Proxmire, 443 U.S. 111, 120, n.9 (1979) with Lampkin-Asam v. Miami Daily News, Inc., 408 So.2d 666, 668, n.3 (Fla. 3d DCA 1982). In any event, the appropriate standard under state law for entering summary judgment is purely a matter of state law, unless the standard contravenes the Constitution of the United States. No such claim is made here. None certainly was made as this matter made its way through the Florida courts. Even in Federal courts, governed as they are by the Seventh Amendment, summary judgment procedures are not violative of the right to trial by jury. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Galloway v. United States, 319 U.S. 372 (1943); Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902).

Riley, 302 U.S. 292 (1937). Nowhere in the Florida courts did Appellant complain of "due process" violations as a result of grossly arbitrary actions which produced an inherently unfair result. There is here simply no Federal question, much less a substantial Federal question.

CONCLUSION

For the reasons advanced, the Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King, respectfully submit that this Appeal was improvidently initiated and that the federal questions advanced by Appellant are so insubstantial as to not need further argument. The Appellees, therefore, respectfully make application to the Court for an Order dismissing this Appeal or, in the alternative, for an Order affirming the prior Judgment.

Respectfully submitted,

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City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 377-3577

Counsel for Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Motion of Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King, to Dismiss or Affirm, were sent, via the U.S. Postal Service, this date to:

Julia McCain Lampkin-Asam
2243 Gorham Avenue
Ft. Myers, Florida 33907

I ALSO CERTIFY, in conformity with the Certificate of Service of Appellant's Jurisdictional Statement, that three true copies of the foregoing Motion of Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King, to Dismiss or Affirm, were sent, via the U.S. Postal Service this date, to the following:

The Honorable Robert Graham
Governor of the State of Florida
The Capitol
Tallahassee, Florida;

The Honorable Jim Smith
Attorney General
State of Florida
The Capitol
Tallahassee, Florida;

The Honorable Sid J. White
Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 33201;

The Honorable Louis J. Spallone
Clerk
District Court of Appeal,
Third District
2001 South West 117 Ave.
Miami, Florida 33165; and

The Honorable Richard P. Brinker
Clerk
Circuit Court, Eleventh Judicial
Circuit, in and for Dade County
Dade County Courthouse
73 West Flagler Street
Miami, Florida 33130.

DATED this 30th day of August, 1982.

JOSEPH P. AVERILL, ESQ.
Counsel for Appellees, Miami Daily News, Inc. and Timothy Johnson, as Personal Representative of the late Terry Johnson King

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1981

CASE NO. 80-2053

JULIA McCAIN LAMPKIN-ASAM,
Appellant,

vs.

MIAMI DAILY NEWS, INC., a Florida corporation, d/b/a The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Appellees.

Opinion filed December 29, 1981.

An Appeal from the Circuit Court for Dade County, Dan Satin, Judge.

Joel V. Lumer, for appellant.
Joseph P. Averill, for appellees.

Before BARKDULL, BASKIN and PEARSON, DANIEL, JJ.

PEARSON, DANIEL, Judge.

Julia McCain Lampkin-Asam, the plaintiff below, wrote a book describing the events which, in Asam's view, had precluded her from receiving research grants for almost a decade and developing a cure for cancer. A major theme of the book, entitled "Malignant Intrigue," was that

Asam's professional competence as a cancer scientist had been disparaged and her mental stability questioned by people in the "cancer establishment." Asam's book identified one Dr. Wilhelmina Dunning, her former supervisor, as the primary villain whose statements concerning Asam had contagiously spread through the cancer research community so as to create, as the plaintiff's title aptly put it, a malignant intrigue.

In 1973, Asam, wanting to draw public attention to her research and need for research funds, brought her 753-page book to the attention of The Miami News. The late Mrs. Terry Johnson King, then Lifestyle Editor of the News, interviewed Asam and decided to write a column about "Malignant Intrigue" and its author. King read the book and concluded that it was a rather vitriolic attack on Dr. Dunning. King decided to get Dunning's side of the story before writing her column and interviewed Dunning on the phone. King then wrote the column, which, overall, was an unflattering evaluation of the plaintiff's malignant intrigue theory. The column included a quote about Asam attributed to Dunning:[1]

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1. The column also characterized the charges made by Asam in her book as "almost paranoical." Since we find King's characterization to be an expression of opinion based on facts set forth in the column, it is, in our view, entitled to absolute constitutional protection. From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981). In Gertz v. Robert Welch, Inc., 418 U.S. 323, 229-340, 94 S.Ct. 2997, 41 L.Ed.2d 289 (1974), the Supreme Court said:

> "[U]nder the First Amendment, there is no such thing as a false idea. However pernicious an opinion might seem, we depend upon its correction not on the conscience of judges or juries but on the competition of other ideas."

See also Palm Beach Newspapers, Inc. v. Early, 334 So.2d 50 (Fla. 4th DCA 1976); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Company, Inc., 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977); Loeb v. Globe Newspaper Co., 489 F.Supp. 481 (D.Mass. 1980). Therefore, we devote the remainder of this opinion to the Dunning statement.

> "To which the highly respected Dr. Dunning says, 'She [Asam] is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspect they gave her the degree to get rid of her.' "

Asam then sued Dunning,[2] The Miami News, and Mrs. King alleging defamation. From a summary judgment entered in favor of The Miami News and the estate of Mrs. King, Asam appeals.

We affirm the summary judgment. The determination that a person is a public figure is properly for the court. *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966); *Gadsden County Times, Incorporated v. Horne*, 382 So.2d 347 (Fla. 1st DCA 1980); *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1968); *Logan v. District of Columbia*, 447 F.Supp. 1328 (D.D.C. 1978); *Hoffman v. Washington Post Co.*, 433 F.Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978). Asam's efforts to arouse public indignation and influence the allocation of public funds, *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970), *second appeal*, 263 So.2d 632 (Fla. 1st DCA 1972); *Murphy v. Daytona Beach Humane Society, Inc.*, 176 So.2d 922 (Fla. 1st DCA 1965); participation in public debates on public health matters, *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, U.S. , 101 S.Ct. 117, L.Ed.2d (1980); *Exner v. American Medical Association*, 12 Wash.App. 215, 529 P.2d 863 (1974); publication and distribution of the autobiographical "Malignant Intrigue" and

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2. Dunning was earlier favored with a summary judgment. Asam's appeal from that judgment was dismissed by this court as untimely filed. Asam unsuccessfully sought relief in the Florida Supreme Court from this dismissal. Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978).

other writings, lectures and speeches, and efforts to seek substantial publicity, including the very publicity which is the subject matter of this action, *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Company, Inc.*, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976); *Guitar v. Westinghouse Electric Corporation*, 396 F.Supp. 1042 (S.D.N.Y. 1975), among other things, aggregately show her, as a matter of law, to be a public figure. *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157, 99 S.Ct. 2071, 61 L.Ed.2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979).

Asam's status as a public figure requires her to establish that the newspaper and Mrs. King acted with actual malice in the constitutional sense, *Curtis Publishing Company v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), that is, the publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 696 (1964); *Gibson v. Maloney, supra.* Viewing the evidence most favorable to the plaintiff, to determine whether there exists a genuine issue of material fact upon which a reasonable jury could find *with convincing clarity* that the defendants acted with such actual malice,[3] we find absolutely no clear

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3. This is the well-accepted test for evaluating the propriety of a summary judgment in a defamation case where actual malice in the constitutional sense must be shown. *See* Yiamouyiannis v. Consumers Union of the United States, Inc., *supra*; Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980); Hahn v. Sargent, 523 F.2d 461 (1st Cir.), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976); Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974); Nader v. deToledano, 408 A.2d 31 (D.C.App. 1979), *cert. denied*, 444 U.S. 1078,

(Continued on following page)

and convincing evidence that the defendants knew that the information published was incorrect or that the defendants had any degree, much less a high degree, of awareness of the probable falsity of this information. *See Long v. Arcell*, 618 F.2d 1145 (5th Cir. 1980).

Mrs. King's testimony in her deposition is, unequivocally, that she accurately quoted Dr. Dunning. On the other hand, Dunning's testimony is that she was "not sure" if she made the statements. Dunning doubted that she would remember the contents of a conversation which took place years before. While she did not recall the conversation with Mrs. King, she admitted some recollection of the book being reviewed, and because ". . . I had been maligned in the book, she might have contacted me to find out if the statements were true." Dunning believed she was "misquoted," because she would not have said those things "in that form." She admitted that responses could possibly have been drawn from her in a succession of questions which could account for the eventual form of the statement attributed to her. Apart from whether she revealed it to Mrs. King during the telephone

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Footnote continued—

S.Ct. , L.Ed.2d (1980); National Association of Government Employees, Inc. v. Central Broadcasting Corp., 396 N.E.2d 996 (1979), *cert. denied*, 440 U.S. 935, S.Ct. , L.Ed.2d (1980); In re McDonough, 296 N.W.2d 648 (Minn. 1980); Brophy v. Philadelphia Newspapers, Inc., Pa.Super, Ct. , 422 A.2d 625 (1980). The standard (convincing clarity, not preponderance) against which the evidence is examined is dictated by New York Times v. Sullivan, *supra;* but the manner of examining the evidence (viewing it most favorably for the non-moving party) in light of the standard is the same as in all summary judgment cases. *See* Guam Federation of Teachers, Local 1581 v. Ysrael, *supra*. *Compare* Wasserman v. Time, Inc., 424 F.2d 920, 922-23 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940, 90 S.Ct. 1844, 26 L.Ed.2d 273 (1970). *See generally* Comment, The Propriety of Granting Summary Judgment for Defendants in Defamation Suits Involving Actual Malice, 26 Vill. L.Rev. 470 (1981).

interview, it was, in fact, Dunning's opinion that George Washington University might have given Asam her degree to get rid of her. Dunning admitted she could have said that the plaintiff was "not qualified to do *independent* cancer research." But most significantly, Dunning said that *if* she made the remarks attributed to her by Mrs. King, she made them facetiously and did not "grant permission to anybody to publish such a facetious remark."

In *Long v. Arcell, supra,* the Fifth Circuit affirmed a judgment notwithstanding a jury verdict of compensatory and punitive damages in favor of a defamation plaintiff. The litigation was prompted by the newspaper article which stated that an ambulance service may have violated the law by operating without a license from the State Board of Health. The reporter testified that he was told by two Board of Health employees that the ambulance service had not been licensed. At trial, one Board of Health employee directly contradicted the reporter's testimony, saying that he told the reporter that the ambulance service was licensed to operate. Moreover, the ambulance service's lawyer asserted that, on the day before publication, he read the reporter a letter from the other Board of Health employee which stated that the ambulance service was authorized to operate. The Fifth Circuit held, 618 F.2d at 1148-49:

> "The plaintiffs' case rested almost entirely upon the testimony of Bradshaw [a Board of Health employee] and Wilson [the attorney for the ambulance service]. Theirs was the only testimony relating directly to the defendant's state of mind. There was no documentary evidence which showed that the defendants knew their article was false or entertained serious

doubts about its accuracy.[4] In sum, the jury was left to decide the case based on the conflicting accounts of the conversations described above. If the applicable burden of proof had been a preponderance of the evidence, a jury verdict either way would have to stand. Similarly, if liability could be imposed on a clear and convincing showing of negligence, we would be hard pressed to disregard the jury's verdict. We repeat, however, that the plaintiff's burden was to prove actual malice by clear and convincing evidence that the defendants knew that their information was incorrect or had a 'high degree of awareness of . . . [its] probable falsity.' (citation omitted).

"Although the Constitution neither condones nor encourages careless journalistic practices, the journalist who merely is careless may not be held liable for defaming a public figure. That is because the interests we must consider in libel cases are not only those of the defamed and the defamer. If they were, the former would prevail with a greater degree of frequency. In all libel suits between a public figure and a publisher the public intervenes as a matter of right, and its interest must be considered. Only by limiting liability to those situations in which the publisher has acted with actual malice do we fully protect the public's right to the benefits of a free and uncensored press."

Where, as in the present case, the person to whom the quoted words are attributed has not unequivocally de-

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4. A plaintiff claiming defamation now has access into the editorial process to procure evidence bearing on the element of actual malice. Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Such a plaintiff may even discover the identity of confidential sources. Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980).

nied making the statement attributed to her; has denied only the form, but not the substance, so as not to rule out the possibility that she was *mistakenly*, but immaterially, misquoted; and has indeed allowed that she may have actually made the statements "facetiously"; the requisite high standard of proof is simply not met.[5] *In re McDonough, supra* ("that high standard of proof usually would require more than one man's word against another, especially where, as here, mistake can not be ruled out.").

Our holding makes it unnecessary to consider the other contentions made by the appellees in support of the summary judgments, and we expressly do not rule upon them.

Affirmed.

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5. We note also that the theory of the plaintiff's action against Dr. Dunning was that Dunning told Mrs. King exactly what was printed and that Dunning had lied. When the plaintiff lost that action, she shifted gears and said that Dunning never said these things, and the newspaper fabricated the statement. Dunning's testimony is even more suspect considering that it was given when Dunning was a defendant facing a defamation action.

(Filed January 27, 1982)

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1982

WEDNESDAY, JANUARY 27, 1982

CASE NO. 80-2053

JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Appellant,

vs.

MIAMI DAILY NEWS, INC., etc.,
Appellees.

Appellant, in proper person having filed in this cause motion for rehearing and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

Louis J. Spallone
Clerk District Court of
Appeal, Third District
By /s/ Evelyn A. Hellman
Deputy Clerk
cc: Julia McCain Lampkin Asam
Joseph P. Averill
/dp

IN THE DISTRICT COURT OF APPEAL
OF THE THIRD DISTRICT
OF FLORIDA

Case No. 80-2053

JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Plaintiff, Appellant, Petitioner,

vs.

MIAMI DAILY NEWS, INC. a Florida Corporation, d/b/a The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Defendants, Appellees, Respondents.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that Julia McCain Lampkin-Asam, Ph.D., Plaintiff, Appellant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered December 29, 1981 (Seven-page opinion filed December 29, 1981); rehearing denied on January 27, 1982.

The decision (1) expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law, and (2) expressly construes a provision of the state or federal constitution.

Respectfully submitted,

/s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.
Pro Se
Plaintiff, Appellant, Petitioner
2243 Gorham Ave.
Ft. Myers, Florida 33907

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice to Invoke Discretionary Jurisdiction was sent by mail this 18th day of February, 1982 to Mr. Joseph Averill, Attorney, 1237 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

By: /s/ Julia McCain Lampkin Asam
Julia McCain Lampkin-Asam, Ph.D.

IN THE SUPREME COURT OF FLORIDA

CASE NO.

JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Plaintiff, Appellant, Petitioner,

vs.

MIAMI DAILY NEWS, INC., a Florida Corporation d/b/a The Miami News, and TIMOTHY JOHNSON, as personal representative of the late TERRY JOHNSON KING,
Defendants, Appellees, Respondents.

JURISDICTION BRIEF FOR DISCRETIONARY REVIEW BY PETITIONER

For Discretionary Review of Case no. 80-2053 from District Court of Appeal, Third District of Florida
Dated February 25, 1982

Submitted by:

Julia McCain Lampkin-Asam, Ph.D.
Pro Se, Petitioner
2243 Gorham Avenue
Ft. Myers, Florida 33907

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*Pagination of typescript brief.

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STATEMENT OF THE CASE

A Complaint was filed on Oct. 16, 1975 (Record (R) 1-4). The Plaintiff below, Appellant, and Petitioner is Julia McCain Lampkin-Asam, Ph.D. The Defendants below, Appellees, and Respondents are the Miami Daily News, Inc., a Florida Corporation d/b/a/ The Miami News and, Timothy Johnson, as personal representative of the late Terry Johnson King. Upon motions to dismiss (R. 9-10, 13-14) and stipulation of the parties (R. 24), one of the defendants was "removed as a party to this action" (R. 23). An Amended Complaint was filed naming as Defendants Wilhelmina Francis Dunning, Terry Johnson King and Miami Daily News, Inc. (R. 22-30). The motions to dismiss filed by these defendants (R. 31-32, 34-35) were denied (R. 36). Defendant Dunning answered (R. 37-38). Defendants King and Miami Daily News filed a joint answer in which Miami Daily News filed a counterclaim (R. 40-44). Count III of the Amended Complaint was voluntarily dismissed (R. 594) as was the counterclaim (R. 1051). Summary judgment motions were filed by each of the defendants (R. 1108-1109, 1223-1225) and the plaintiff (R. 1448-1449). Summary judgment was entered for defendant Dunning (R. 1471-1472). The motions of defendants, King and Miami Daily News (R. 1473) and plaintiff (R. 1470) were denied. The motion for reconsideration of defendants Miami Daily News and King (R. 1475-1476) was denied (R. 1483). Defendant King died and her personal representative was substituted as a defendant (R. 1484).

At the pretrial conference an issue arose as to the plaintiff's status as a public figure (R. 1901), and the court entered an order determining that the plaintiff was a public figure for purposes of applying the law of defamation (R. 1901-1904). The court then ordered a hearing on the issue of "actual malice" (R. 1811) and the parties

filed memoranda on this issue (R. 1797-1810, 1877-1894, 1895-1897). A hearing was held on Sept. 19, 1980 (R. 2001-2047) and on Oct. 8, 1980 (R. 2053-2057) the court entered a Summary Final Judgment for defendants Miami Daily News, *et al.* (R. 2053-2057). A motion for rehearing (R. 1907-1908) was denied (R. 1909) and the plaintiff filed a notice of appeal (R. 1910-1911), (Appendix pp. A-14-15). The Third District Court of Appeal on Dec. 29, 1981, filed a seven page opinion, affirmed (see Appendix bound separately, pp. A-1-A-7). On Jan. 5, 1982, the Appellant, Plaintiff below, filed a Motion and Petition for Rehearing (Appendix pp. A-18-A-75), which was denied on Jan. 27, 1982 (Appendix p. A-8). On Feb. 18, 1982 (Appendix p. A-17) petitioner, Appellant and Plaintiff below requested this Honorable Court invoke its Discretionary Jurisdiction to review this cause based upon two grounds: (1) that the decision expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law, and (2) that the decision expressly construes a provision of the state or federal constitution.

ISSUES

I. Does the Supreme Court of Florida have jurisdiction under Art. V, Section 3(b)3, *Fla. Constitution*, (*Fla. Rules of Appellate Procedure*, Rule 9.030(a)(2)(A)(iv), to review by discretionary review this cause in that there is an express direct conflict on the issue of Summary Judgment when genuine issues of material fact exists in the decision of the Third District Court of Appeal in *Lampkin-Asam v. Miami News et al.* case no. 80-2053 decided Dec. 29, 1981 (motion for rehearing denied Jan. 27, 1982) and in the decision of the First Dist., *Axelrod v. Califano*, 357 So 2d 1048, 1051, (Fla. 1st DCA 1978); in the decision of the Second Dist., *Holter v. WLCY, T.V., Inc.*, 366 So 2d

445, (Fla. 2nd DCA 1978); in previous decisions of Third Dist., *First Mortgage Investors v. Boulevard Nat. Bank of Miami*, 327 So 2d 830, 832 (Fla. 3d DCA 1976), and *Mejiah v. Rodriguez*, 342 So 2d 1066, (Fla. 3d DCA 1977); and the U.S. Supreme Court, *Hutchinson v. Proxmire*, 443 U.S. 111, 120 fn 9, 61 L Ed 2d 411, 99 S Ct 2675 (1979)?

II. Does the Supreme Court of Florida have jurisdiction under Art. V, Section 3(b)3, *Fla. Const.*, (*Fla. Rules of Appellate Proc.*, Rule 9.030(a)(2)(A)(iv) to review by discretionary review this cause in that there is an express direct conflict on the public figure issue as well as constitutional issue (*Fla. Rules of Appellate Proc.*, Rule 9.030(a)(2)(A)(ii) concerning a public figure in the decision of the Third District Court of Appeal in *Lampkin-Asam v. Miami News et al.*, (Dr. Lampkin-Asam is not a public figure as the Third Dist. erroneously decided) and the decisions in the U.S. Supreme Court, *Hutchinson v. Proxmire, supra; Time Inc. v. Firestone*, 424 U.S. 448, 47 L Ed 2d 154, 96 S Ct 958 (1976); *Wolston v. Reader's Digest Assoc. Inc.*, 443 U.S. 157, 99 S Ct 2701, 61 L Ed 2d 450 (1979); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974)?

III. Does the Supreme Court of Florida have jurisdiction under Art. V, section 3(b)3, *Fla. Const.*, (*Fla. Rules of Appellate Proc.*, Rule 9.030(a)(2)(A)(iv) to review by discretionary review this cause in that there is an express direct conflict on the "actual malice" issue as well as a constitutional issue (*Fla. Rules of Appellate Proc.*, Rule 9.030(a)(2)(A)(ii) concerning the "actual malice" issue ("actual malice" as defined in the *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), in the decision of the Third District Court of Appeal in *Lampkin-Asam v. Miami News et al.*, and the decision in the Second Dist., *Holter v. WLCY, T.V., Inc., supra*; in the Fourth Dist.

Cape Publications, Inc. v. Adams, 336 So 2d 1197, (Fla. 4th DCA 1976); and the Supreme Court, *Hutchinson v. Proxmire*, 443 U.S. 111, 120 at fn 9 (1979)? NOTE: *Hutchinson v. Proxmire, supra* cited on page 3 of the Opinion of the Court (Appendix page A-3).

ARGUMENT

Argument Point 1: The Supreme Court of Florida does have jurisdiction to review express and direct conflicts in the district courts and the Supreme Court, concerning Summary Judgment in libel cases. The U.S. Supreme Court has noted, in reversing a summary judgment for a defendant, that proof of "actual malice" calls a defendant's state of mind into question and does not readily lend itself to summary disposition. See *Hutchinson v. Proxmire*, 443 U.S. 111, 120 at fn. 9 (1979). (Case *Hutchinson v. Proxmire, supra*, cited in Opinion page 3 (Appendix p. A-3). See *Herbert v. Lando*, 441 U.S. 153, 99 S Ct 1635, 60 L Ed 2d 115, (1979), that plaintiff has access into the editorial process to procure evidence bearing on the element of actual malice. In the instant case, "actual malice" is clearly shown in the depositions of Dunning and King and documents in the record from the book *Malignant Intrigue*, (See Appendix pp. A-19-32 and Exhibits for details). On p. 6 of the Opinion, (Appendix p. A-6), the Third District Court of Appeals failed to state the main conflicting fact in Dr. Dunning's deposition versus Ms. King's statement that she quoted the statements attributed to Dr. Dunning accurately (p. 4 of the Opinion, Appendix p. A-4). Dr. Dunning stated in the record p. 1252, "I do not recall ever saying anything to the Miami News about Dr. Asam." (Quoted also in Appellant Brief p. 6.) The Opinion of the Third District Court of Appeal failed to mention the obvious possibility that Ms. King *fabricated* the quotes attributed to Dr.

Dunning in the Miami News. (See *Burnett v. National Enquirer*, 7 Med L. Rptr 1321 (1981),

> "Magazine's publication, with actual malice, of libelous article that, in reporting on plaintiff's alleged conduct at restaurant, fabricated certain events, and magazine's bad faith in failing to publish adequate correction warrant award to plaintiff of $750,000 punitive damages."

Miami News failed to retract article (Appendix p. A-81) after notice statements were false (Appendix p. A-82). Ms. King was not scheduled to interview Dr. Lampkin-Asam but a Ms. Billy O'Day was scheduled (R. 1547-1559). Ms. King did the interview without Dr. Lampkin-Asam soliciting her. The Miami News article, Oct. 23, 1973 included a quote about Dr. Lampkin-Asam attributed to Dr. Dunning.

> "To which the highly respected Dr. Dunning says, 'She is very emotionally disturbed, and has no qualifications to do cancer research. She may have gotten her doctorate from George Washington University, but I suspect they gave her the degree to get rid of her.'" (See Appendix p. A-81).

Dr. Dunning (R. 1305) said it is a misstatement. The deposition of Dunning (R. 1252) read in the light most favorable to the plaintiff, Dunning denied having made these statements to King. There is ample evidence in the record from which a jury could conclude that Dunning was telling the truth, that King was lying and that the quotes published by King were fabricated. Given the "slightest doubt" standard (*First Mortgage Investors v. Boulevard Nat. Bank of Miami, supra* and *Mejiah v. Rodriguez, supra*) the issue of whether King had lied and created the quotes as a product of her imagination should be left to a jury. The courts of this state and the U.S. Supreme Court have

instructed us that these issues are not to be resolved by a summary judgment, but are to be decided by a jury as the finder of fact. The Third District Court of Appeal of the State of Florida is expressly and directly in conflict with libel action in the First District, Court of Appeal, in which the Florida court held that summary judgment should be sparingly granted so as not to infringe upon the constitutional right to a jury trial, *Axelrod v. Califano, supra*, and that the question of actual malice is one for a jury (*Holter v. WLCY, T.V., supra* in the Second District.)

Argument Point 2: The Supreme Court of Florida does have jurisdiction to decide whether Dr. Lampkin-Asam is a public figure as a matter of law. The decision of the Third District is expressly in direct conflict with the *First Amendment to the U.S. Constitution* because Dr. Lampkin-Asam is not a public figure according to the case of *Hutchinson v. Proxmire, supra* and the case of *Wolston v. Reader's Digest Assoc., Inc., supra;* (Both cases were cited on p. 3 of the Opinion, Appendix p. A-3, incorrectly indicating that Dr. Lampkin-Asam was a public figure as a matter of law). The similarity between the societal position held by Hutchinson and the societal position of the petitioner in the instant case is striking. Both Dr. Lampkin-Asam and Dr. Hutchinson are research scientist. The life histories of any two persons can always be distinguished on the facts, but the thrust of the *Hutchinson* decision is that this type of person is not to be considered a public figure for the purpose of the law of defamation. The U.S. Supreme Court reversed, holding that Hutchinson was not a public figure for purposes of defamation. The court stated that Hutchinson's activities and public profile are much like those of countless members of his profession. His published writings reached a relatively small category of professionals concerned with research in his

field of interest, 443 U.S. at 135. As shown by the *Hutchinson v. Proxmire, supra,* decision public figure status is not obtained by publishing scientific articles, receiving public grant money, active solicitation of other public grants, local press coverage of one's scientific activities and public interest in the precise activities for which one received funds. Under these standards, the plaintiff in the instant case is not a public figure for the purposes of the law of defamation.

As shown from the Firestone and Wolston decisions (cited above) extended coverage in the press, the holding of several press conferences, reports by the FBI and prominence in local society are not enough to make one a public figure. The petitioner in *Gertz v. Robert Welch, Inc., supra,* had published books and articles on legal issues; he had been active in local community affairs. Nevertheless, the court concluded that his activities did not make him a public figure.

The bottom line of this incorrect public figure decision by the Third District Court of Appeal is that the Third District has been misled by Mr. Averill's "figment of his imagination" that Dr. Lampkin-Asam is a public figure by stating in his brief for Appellees that Dr. Lampkin-Asam is a public figure with no reference to the record on p. 10 of his Appellee Brief,

> "She has attempted to arouse public indignation and to influence the allocation of public funds."

This is a false statement with no reference to the record; Dr. Lampkin-Asam has not influenced any allocation of public funds, and has not aroused any public indignation. Further, Mr. Averill stated,

> "She is a scientist taking part in a public debate on a public health matter."

This is a false statement with no reference to the record. The truth is that Dr. Lampkin-Asam has never been in a public debate. The instant case should be decided according to the facts in the record, not according to what an attorney, Mr. Averill, states in an Appellee Brief without reference to the record. Since such a gross error was made by the Third District Court, making an express direct conflict with other courts on the public figure issue, and by the Third Dist. deciding erroneously that Dr. Lampkin-Asam is a public figure, the Supreme Court of Florida should exercise its discretion and entertain the case on the merits if it does find it has discretionary jurisdiction, and allow the petitioner to write a merits brief and present oral argument.

The Miami News has failed to identify the alleged "public controversy." Under *Gertz*, (cited above) unless Plaintiff has acquired pervasive fame or notoriety Defendants must identify the particular public controversy into which she had injected herself before they can claim a privilege based upon the First and Fourteenth Amendments. Since the Gertz decision, the U.S. Supreme Court has repeated this requirement of a "public controversy" in *Time, Inc. v. Firestone, supra, Hutchinson v. Proxmire, supra* and *Wolston v. Readers Digest, supra.* There is no absolute constitutional protection for knowingly publishing false facts, (*N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). Ms. King libeled Dr. Lampkin-Asam by making the statement "almost paranoical" in the said news article, which is not privileged opinion when based on false facts, (*N.Y. Times Co. v. Sullvian, supra.*)

Argument Point 3: The Supreme Court of Florida does have jurisdiction since the Third District Court of Appeal is expressly and directly in conflict with the Second District in *Holter v. WLCY T.V., Inc., supra.* In reversing a

directed verdict for the defendants in a libel action by a public official, the court in *Holter v. WLCY T.V., Inc., supra* at 453, stated that the evasiveness and contradictions by a reporter are a ground for a jury to find that a reporter knew that his statements were false. The court found that repetition of another's words does not release one of responsibility if the reporter knew that the words are false or inherently improbable. According to Ms. King's deposition, she studied law; she certainly knew the statements attributed to Dr. Dunning were "libelous per se" and it was highly unlikely that a respected university such as The George Washington University would give someone a Ph.D. to get rid of them. Further, if Ms. King read *Malignant Intrigue* book as she claimed (R. 1202), then she would have seen on p. 48, (Appendix p. A-49), that Dr. Lampkin-Asam was an honor student and a member of the Sigma Xi; therefore, Ms. King knowingly published the false statements about Dr. Lampkin-Asam. Actual malice was shown by Ms. King and this case should be decided by a jury. The Third District Court of Appeal is expressly and directly in conflict with the Fourth District in *Cape Publications, Inc. v. Adams, supra,* (King was on notice Dunning was in a feud with Asam), the reporter in Cape Publications knew that his source had a feud with the subject of his story and was thus on notice as to the source's questionable credibility. This was one of the bases upon which the appellate court found sufficient evidence of actual malice and affirmed a jury verdict in favor of a public official.

In re *McDonough*, 296 N.W. 2d 648 (Minn. 1980), cited in the opinion, p. 4 (Appendix p. A-4), Dr. Lampkin-Asam has met this burden concerning proof of "actual malice" by the reporter, Ms. King, and Dr. Dunning, if she made the statements, by what is stated in the depositions of King and Dunning and the documents shown in the *Malignant*

Intrigue, which Ms. King (R. 1202), unequivocally stated that she said. The Third District is in direct conflict with the U.S. Supreme Court, (*Hutchinson v. Proxmire, supra*), concerning "actual malice" which states,

> "The proof of actual malice calls defendant's state of mind into question . . . and does not readily lend itself to summary disposition."

CONCLUSION

The Supreme Court of Florida should take discretionary jurisdiction because the Third District Court of Appeal has (1) expressly and directly made a decision that conflicts with decisions of another district court of appeal or of the Supreme Court on the same question of law, and (2) expressly made a decision that construes a provision of the state or federal constitution. The Supreme Court of Florida after taking jurisdiction should decide the case on the merits or remand for a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdiction Brief and Appendix, bound separately, was sent by mail this 25th day of February, 1982 to Mr. Joseph Averill, Attorney, 1237 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

By: /s/ Julia McCain Lampkin-Asam
Julia McCain Lampkin-Asam, Ph.D.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,784

JULIA McCAIN LAMPKIN-ASAM, Ph.D.,
Petitioner,

vs.

MIAMI DAILY NEWS, INC., a Florida Corporation, d/b/a The Miami News, and Timothy Johnson, as personal representative of the late Terry Johnson King,
Respondents.

RESPONDENTS' JURISDICTIONAL BRIEF

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,784

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Respondents.

PRELIMINARY STATEMENT

Despite its incantation of the talismanic "expressly and directly" language, Petitioner's Jurisdictional Brief fails to provide any basis for discretionary review by this court of the decision of the District Court of Appeal, Third District, in this action.

To support her ill-founded assertion of express and direct conflict, Petitioner is reduced to quarreling with the facts stated in the Third District's decision. She also adopts the happy—but impermissible[1]—expedient of asserting conflict with decisions from other jurisdictions and with decisions of the federal courts.

Since the 1980 reform of this Court's jurisdiction, that jurisdiction is certainly no broader than that recognized in *Nielsen v. City of Sarasota*, 117 So.2d 731, 734 (Fla. 1960):

> While conceivably there may be other circumstances, the principle situations justifying the invocation of our jurisdiction to review decisions of courts of appeal because of alleged conflict are (1) the announce-

1. *See, e.g. Kyle v. Kyle*, 139 So.2d 885 (Fla. 1962).

> ment of a *rule of law* which conflicts with the rule previously announced by this court; or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this court.
>
> Under the first situation the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the court of appeal. Under the second situation the controlling facts become vital and our jurisdiction may be asserted only where the court of appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in allegedly conflicting decisions of this court.

A review of petitioner's jurisdictional brief reveals that she can discern no "rule of law" in the Third District's opinion which conflicts with any rule of law articulated by this court or another district court. Rather, her argument is a factual one and, to create the appearance of conflict, the Petitioner finds it necessary to go behind the facts set forth by the Third District and invite this court to declare the Third District to be factually incorrect.

If the court accepts this invitation to revive "record conflict," it will undo the re-working of Article V, Section 3 of the Florida Constitution which went into effect on April 1, 1980. Since that date, as was held in *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980):

> This court may only review the decision of a district court of appeal that *expressly* and directly conflicts with a decision of another court of appeal or the supreme court on the same question of law. The dictionary definitions of the term "express" include: "to

> represent in words"; "to give expression to." "Expressly" is defined: "in an express manner."

Since the 1980 revision of this court's jurisdiction, this court may review only a "decision" of a district court. No longer will the language and expressions found in a dissenting or concurring opinion support jurisdiction. *Jenkins v. State, supra.* The "record proper" conflict of *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965) is a thing of the past. The Petitioner is not permitted to quarrel with the facts set forth in the Third District's opinion to assert "record conflict." Florida's jurisprudence has returned to the view, expressed by this court in *Commerce National Bank v. Safeco Insurance Co.*, 284 So.2d 205, 207 (Fla. 1973) that:

> When facts and testimony are set forth in a majority opinion, they are assumed to be an accurate representation upon which the judgment of the court is based.

Talismanic language aside, Petitioner's position is simply that the Third District was wrong. To make even a colorable showing, she is forced to dispute the facts articulated by the Third District. The Petitioner seeks a different result, not review of a decision which expressly and directly conflicts with another decision. As this court noted in *Ansin v. Thurston*, 101 So.2d 808, 811 (Fla. 1958):

> A limitation of review to decisions in "direct conflict" clearly evidences a concern with decisions as precedents as opposed to adjudications of the right of particular litigants.

This particular litigant simply wants a second appeal under the guise of "record conflict." While she may have been, in a sense, entitled to this prior to April, 1980, she no longer is. This court is without jurisdiction to review

the Third District's decision since there is represented in the words of that decision no direct conflict with any other Florida decision.

THE "SUMMARY JUDGMENT" ISSUE

The Third District's decision does not dispute that, under appropriate circumstances, "actual malice" may be an issue for a jury. Nor did the Third District dispute the rule that summary judgment should not be entered if there is the "slightest doubt" concerning its propriety. Rather, the Third District found absolutely no evidence that the Petitioner could meet her burden of proof. (Petitioner's Appendix, p. A-4.) Where there is absolutely no evidence to support a plaintiff's lawsuit, summary judgment is proper; no Florida case has ever suggested to the contrary. As this court noted in *Nielsen v. City of Sarasota, supra,* 117 So.2d at 734:

> In the instant case the court of appeal, as we read its opinion, merely held that on the basis of the record before it there was a total absence of evidence. . . . We do not here suggest that if we had been charged with the responsibility of the court of appeal in the instant case we would have reached the same conclusion that they reached. In fact, it is altogether possible that we might have arrived at an entirely different conclusion as to the ultimate effect of the circumstantial evidence and justifiable inferences to be drawn therefrom. [Citation omitted.] Such a difference of view, however, is not the measure of an appellate jurisdiction to review decisions of courts of appeal because of alleged conflict with prior decision of this court on the same point of law.

In viewing the evidence most favorably to the Petitioner and in concluding that the record contained absolutely

no evidence that Petitioner could support her burden of proof on trial, the Third District decision in no way expressly or directly conflicts with the Florida case law.

THE "PUBLIC FIGURE" ISSUE

In disputing the Third District's holding that she is a "public figure" for the purposes of libel law, Petitioner presents three pages of argument without citation to a single Florida decision. She asserts, at page 6 of her brief:

> The decision of the District court is expressly in direct conflict with the *First Amendment to the U.S. Constitution* because Dr. Lampkin-Asam is not a public figure. . . [Emphasis in original.]

Such an argument entirely misconceives this court's jurisdiction. The Third District's decision did not expressly explain or amplify a provision of the state or federal constitution. The Third District merely applied—and correctly so—a well-developed body of federal and Florida case law to determine the Petitioner to be, for purposes of libel law, a "public figure". Mere application of constitutionalized law is insufficient to vest jurisdiction in this court. *Ogle v. Pepin*, 273 So.2d 391 (Fla. 1973); *Armstrong v. City of Tampa*, 106 So.2d 407 (Fla. 1958).

THE "ACTUAL MALICE" ISSUE

Petitioner does not quarrel with the Third District's formulation of "actual malice" in the constitutional sense. Found at Petitioner's Appendix, p. A-4, that formulation of "actual malice" is this:

> The publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity. . . .

The Third District then examined the evidence in the record and properly concluded that Petitioner, under no view of the facts, could present a jury issue on the "actual malice" issue. In so doing, the Third District acted correctly and certainly created no express and direct conflict with prior Florida case law. Indeed, Petitioner complains of none.

Rather, Petitioner seems to suggest that the Third District produced a different result in a case which involves substantially the same controlling facts as a prior case. That prior case, in Petitioner's view, is *Holter v. WLCY T.V., Inc.*, 366 So.2d 445 (Fla. 2d DCA 1979). But the facts in *Holter* are totally different from the facts here. *Holter* involved a succession of television and radio news broadcasts. During the day and a half involved in the repeated broadcasts of the same story, the defendants acquired significant information concerning the accuracy of their story but did not, in the slightest, vary the broadcasts. In sum, the *Holter* broadcast involved assertions that a "hush-hush undercover probe" had uncovered "serious irregularities" and that the mayor, who was resigning from office, was strongly suspected of embezzlement and extortion. Although the reporter had assured his superiors that his report was based on a known and reliable source, the report was in fact based on an anonymous and unverified telephone call.[2] Even the anonymous telephone caller had not accused the mayor of embezzlement and extortion. A claim that a "full team of undercover men" was involved in the investigation was a fabrication. The

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2. Petitioner would have this court believe that the testimony in this case by a reporter demonstrated evasiveness and contradiction. (Petitioner's Jurisdictional Brief, p. 9.) Not unsurprisingly, the Third District noted that the reporter testified "unequivocally." (Petitioner's Appendix, p. A-4.) Petitioner now contends, for the first time and impermissibly, that the reporter's testimony was "inherently improbable."

station was even unable to confirm that an investigation was underway prior to the first broadcast. During the succession of broadcasts, the mayor involved protested to the reporter who admitted there may be a "mix-up." Despite this admission of a possible "mix-up," the television and radio reports continued. On this evidence, the Second District properly concluded that a jury issue as to "actual malice" was present.

But those facts and that conclusion have nothing to do with this case.[3] The evidence as to the *Holter* reporter's state of mind permitted an inference of "actual malice." Here, the evidence, viewed most favorably to the Petitioner, does not permit such an inference. Although there are some variances in the testimony, the Third District was correct in concluding that the variances present in the testimony would not lawfully permit a jury, even viewed in the most favorable light, to find for the Petitioner. There if no conflict.

CONCLUSION

The Petitioner has totally failed to show that the decision of the District Court of Appeal, Third District, in this action expressly and directly conflicts with any prior decision in this state. Accordingly, it is submitted that the "Notice to Invoke Discretionary Jurisdiction" be

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3. There is an "Alice-in-Wonderland" quality to Petitioner's assertion that probative evidence of "actual malice" is to be found in the alleged "feud" between Dr. Dunning and the Petitioner. *Cape Publications, Inc. v. Adams*, 336 So.2d 1197 (Fla. 4th DCA 1976). The alleged "feud" reduced Dr. Dunning, according to Petitioner, to "questionable creditability." But as the Third District noted, Petitioner made Dr. Dunning the "primary villian" of the autobiography. Dr. Dunning's role was not that of instigator of the story. Her role was passive, not active. The article in question was not provoked by and based on the statements of a vengeful and anonymous source.

dismissed and the Third District's correct and well-reasoned decision be allowed to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Jurisdictional Brief was mailed this 16 day of March, 1982, to Julia McCain Lampkin-Asam, Ph.D., Pro Se, 2243 Gorham Avenue, Ft. Myers, Florida 33907.

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SUPREME COURT OF FLORIDA
MONDAY, JUNE 7, 1982

CASE NO. 61,784

District Court of Appeal, 3d District - No. 80-2053
JULIAN McCAIN LAMPKIN-ASAM, Ph.D.,
Petitioner,

v.

MIAMI DAILY NEWS, INC., etc., et al.,
Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.
By: /s/ Debbie Causseaux
Deputy Clerk

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. Dan Satin, Judge
Hon. Richard P. Brinker, Clerk
Julia McCain Lampkin-Asam, Ph.D.
Joseph P. Averill, Esquire